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No.

IN THE

# Supreme Court of the United States

October Term, 1982

AVONDALE SHIPYARDS, INC.,

*Petitioner,*

*v.*

KAISER ALUMINUM & CHEMICAL SALES, INC.,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTION PRESENTED

Is not the decision of the court below that an antitrust illegality defense may not be asserted in an action to compel payment for an illegally tied product such a misinterpretation of this Court's holding in *Kaiser Steel Corp. v. Mullins*, 455 U. S. —, 102 S. Ct. 851 (1982), that it should be reversed summarily as in conflict with that decision?

## PARTIES IN THE COURT OF APPEALS

The parties in the Court of Appeals were Avondale Shipyards, Inc. ("Avondale"), petitioner herein, appellant below, and defendant and counterclaimant in the District Court; and Kaiser Aluminum & Chemical Sales, Inc. ("Kaiser"), respondent herein, appellee below, and plaintiff, defendant in counterclaim, and third-party plaintiff in the District Court.

Avondale is a subsidiary of Ogden Corporation. Kaiser is a subsidiary of Kaiser Aluminum & Chemical Corporation and a former affiliate of Kaiser Industries Corporation.

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Petitioner, Avondale Shipyards, Inc., respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 7, 1982, and that the judgment be reversed summarily because it so misinterprets and is so contrary to the holding of this Court in *Kaiser Steel Corp. v. Mullins*, 455 U. S. —, 102 S. Ct. 851 (1982), that it threatens the integrity of that decision.

## OPINIONS BELOW

The opinion of the Court of Appeals (A1-34)* is reported at 677 F. 2d 1045 (5th Cir. 1982). The order denying rehearing and rehearing en banc (A40-41) is noted at 683 F. 2d 1373 (5th Cir. 1982). The order of the United States District Court for the Eastern District of Louisiana (A35) is not reported.

## JURISDICTION

The judgment of the Court of Appeals (A38-39) was entered on June 7, 1982. Timely petitions for rehearing were denied on July 26, 1982 (A40-41), and this petition is being filed within 90 days of that date. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U. S. C. § 1254(1).

## STATUTORY PROVISIONS AND COURT RULE INVOLVED

This case involves the following statutes and court rule, each of which is set forth in full in the Appendix, beginning at A42:

Sherman Act

Section 1, 15 U. S. C. § 1
Section 2, 15 U. S. C. § 2

Clayton Act

Section 3, 15 U. S. C. § 14

Federal Rules of Civil Procedure

Rule 12(f).

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* All references herein to "A" pages are references to the Appendix to this Petition.

## STATEMENT OF THE CASE

The District Court struck as legally insufficient a defense by Avondale Shipyards, Inc. ("Avondale") that the contract under which it was sued by Kaiser Aluminum & Chemical Sales, Inc. ("Kaiser") was unenforceable because it embodied a tying arrangement in violation of the federal antitrust laws (A35). The Court of Appeals affirmed even though Kaiser's contract action seeks to enforce the tie by demanding payment for the tied product (677 F. 2d at 1057-61; A25-34). This petition seeks review of that decision in light of this Court's holding in *Kaiser Steel Corp. v. Mullins*, 455 U. S. —, —, 102 S. Ct. 851, 858 (1982), that an illegality defense should be entertained where the relief sought by the plaintiff would enforce a violation of the antitrust laws. Because the decision of the Court of Appeals conflicts with the *Kaiser Steel* holding, Avondale seeks summary reversal.

Under the contract in question, Kaiser agreed to provide Avondale with the two components of a liquefied natural gas cargo containment system for three ships Avondale was building for its customer. One component was a set of aluminum tanks in which the gas cargo would be carried at the extremely cold temperatures necessary to keep it liquefied. The other was a unique type of polyurethane foam that was supposed to insulate the ships' steel bulkheads from those temperatures and contain any gas seepage from the tanks.

Kaiser was the only available source of the polyurethane foam, and it refused to supply the foam unless Avondale bought the aluminum tanks from it. Because the Kaiser foam was an essential component of the system, Avondale acceded to this anticompetitive coercion. The original contract price for provision of the two components was $70,955,000, which sum was to be adjusted by a fair and reasonable amount reflecting any changes in the scope of Kaiser's obligations after the contract came into force.

In 1979, Kaiser, asserting diversity of citizenship, 28 U. S. C. § 1332, sued for a "balance due" under the contract in excess of $40,000,000. The claim is based on alleged contract changes, such as modifications of the aluminum tank design, that are said to entitle Kaiser to an upward adjustment in the contract price for provision of the two components. Most of the "balance" sought is an increase in the price for the modified tanks.

Avondale asserted as a defense that the contract embodied a tie illegal under Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and Section 3 of the Clayton Act, 15 U. S. C. § 14. On Kaiser's motion under Rule 12(f) of the Federal Rules of Civil Procedure, the District Court struck that defense, citing *Kelly v. Kosuga*, 358 U. S. 516 (1959). (A35.)

The District Court certified that its order decided a matter appropriate for interlocutory review (A36), and the Court of Appeals granted Avondale's petition for leave to appeal under the Interlocutory Appeals Act of 1958, 28 U. S. C. § 1292(b). (A37). On appeal, Kaiser relied on *Kelly* and the decision in *Mullins v. Kaiser Steel Corp.*, 642 F. 2d 1302 (D. C. Cir. 1980), as the primary bases for affirming the District Court order.

After the close of briefing but before oral argument before the panel, this Court reversed the decision in *Kaiser Steel*. Nevertheless, in affirming, the Court of Appeals relied heavily on *Kelly* and made only three passing references to *Kaiser Steel*, citing this Court's decision as support for its holding without any extended discussion. *See* 677 F. 2d at 1058-61; A28-33.

This petition seeks review only of the Court of Appeals' decision with respect to the antitrust defense. Avondale does not raise herein the questions presented by the court's concurrent affirmance of the dismissal of an Avondale antitrust counterclaim. *See* 677 F. 2d at 1050-57; A8-25.

## REASONS FOR GRANTING THE WRIT

### The Decision of the Court of Appeals Conflicts with and Undermines *Kaiser Steel Corp. v. Mullins.*

In *Kaiser Steel*, this Court declared that "the illegality defense should be entertained in those circumstances where its rejection would be to enforce conduct that the antitrust laws forbid." 102 S. Ct. at 858. It thus permitted assertion of the defense in an action to recover unpaid contributions to union health and retirement funds because those payments were linked to and served to enforce an illegal restraint of trade against coal companies not making payments to those funds. *Id.*

In this case, Kaiser is seeking to enforce its illegal tie of sale of the tanks to the foam by demanding payment of the balance of an adjusted contract price for the tied items. Nevertheless, the Court of Appeals refused to allow the defense. "The precise conduct against which the antitrust laws seek to protect in the present context is tying," the Court asserted, and, since "Kaiser does not seek to enforce the tie-in by suing a party who has received the desired tying product and now refuses to accept the tied product," the defense is "inapplicable." 677 F. 2d at 1060; A31. In other words, the defense would be allowed only if Kaiser sought specific performance of the precise illegal act.

This result conflicts with the *Kaiser Steel* holding. There too the contractual relief sought, payment of fund contributions, was not the same as the precise conduct made illegal under the antitrust laws. But the illegal conduct there at issue, a restraint of trade against noncontributing coal companies resulting from additional fund payments required of contributing companies if they bought coal from the noncontributors, would be enforced

if the payments were compelled. Here, compelled payment of the price of the tied tanks, even if only in the form of an upward price adjustment caused by "changes" in the tank design, enforces the forbidden tie itself.

*Kaiser Steel* is just one application of the fundamental maxim that illegal promises will not be enforced. This rule has been followed from early common law times and has been applied by this Court to anticompetitive agreements at least since the turn of this century. *See Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227 (1909); *McMullen v. Hoffman*, 174 U. S. 639 (1899) (citing early cases).

The decision most heavily relied on by the courts below, *Kelly v. Kosuga*, discussed this rule with respect to a Sherman Act defense to an action for the balance due on an onion sale. The sale was part of a contract between the plaintiff and defendant containing an agreement to inflate the market price falsely by not delivering onions on the futures market. The question presented was whether, as the defendant contended, the defense should be rejected only if it was asserted by someone not a party to the illegal agreement. Under such a doctrine, the defense would be proper in *Kelly* because the defendant was a party to the illegal contract. *See* 358 U. S. at 519.

Reviewing the cases, this Court rejected the defendant's argument. It concluded that "the character of the parties is not in itself determinative" and that the controlling principle is whether "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act." 358 U. S. at 520. Such would not be the result of enforcing the onion sale, since it was "an intelligible economic transaction" that merely "furnished the occasion for" the allegedly illegal nondelivery agreement. *Id.* at 521. Compelled payment for the onions would have no enforcement effect on the illegal part of the agreement.

Although *Kelly* was not a radical departure from pre-existing case law, some lower courts suggested otherwise. The decision was cited to read prior cases upholding the defense, such as *Continental Wall Paper, supra,* virtually out of existence. The lower court opinions in *Kaiser Steel* were prime examples of that extreme view. The Court of Appeals in that case went so far as to declare that it would not delve "behind the element of the contract being enforced to the gist of the original bargain" because "an exploration into the purported anticompetitive purpose of a contract clause is precisely what *Kelly* disallows." *Mullins v. Kaiser Steel Corp., supra,* 642 F. 2d at 1310.

It was in this context that this Court granted certiorari and reversed in *Kaiser Steel.* The Court made clear that the *Continental Wall Paper* rule is still good law and that *Kelly* was just an application of the common law exception "that the promisor may not avoid performing a perfectly legal promise because he has also made a separate, illegal undertaking." 102 S. Ct. at 858 n. 7. Where the promise sought to be enforced is not separate, but rather is "linked to" and enforces the illegality, *Kelly,* like the cases that preceded it, "contemplated that the defense of illegality would be entertained." *Id.* at 858.

Against this background, the "special and important reasons" justifying issuance of a writ in this case are apparent. It is disturbing that the Court of Appeals, in the first opinion on this issue since *Kaiser Steel* was decided by this Court, treated the Court's pronouncement with such meager attention. *See also Rooney v. Columbia Pictures Industries, Inc.,* 538 F. Supp. 211, 229-30 (S. D. N. Y. 1982). But it is of greatest significance that the opinion of the Court of Appeals relies on and perpetuates the misunderstanding of *Kelly* that *Kaiser Steel* sought to rectify.

Under the Court of Appeals' decision, the illegal gist of the bargain remains immaterial, and the contractual remedy sought by the plaintiff continues to be examined with a tunnel vision that divorces it from its enforcement effect on the contract's illegal objective. Thus, the Court of Appeals declares that payment for "change work" consisting of design alterations to the tied product is not linked to the illegal tie, but is an "intelligible economic transaction in itself." 677 F. 2d at 1060; A31 (quoting *Kelly*, 358 U. S. at 521). The *Kelly* onion sale was "intelligible" because it did not enforce the illegal price scheme, but the same cannot truly be said of Kaiser's demand for increased payments for "changed," but still illegally tied, cargo tanks. The approach of the Court of Appeals misapplies and is inconsistent with the reasoning of *Kaiser Steel*.

## CONCLUSION

The decision of the Court of Appeals conflicts with this Court's holding in *Kaiser Steel*. It adheres instead to a misinterpretation of *Kelly* that *Kaiser Steel* sought to correct. Since the Court of Appeals misapplied the clear holding of this Court, Avondale requests that a writ of certiorari issue and that, upon issuance of the writ, this Court remove the conflict by summarily reversing the decision of the Court of Appeals and reinstating Avondale's antitrust defense. *See Board of Education v. McCluskey*, 458 U. S. —, 102 S. Ct. 3469 (1982); *Michigan v. Thomas*, 458 U. S. —, 102 S. Ct. 3079 (1982).

Respectfully submitted,

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Dated: October 25, 1982.